

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

FENIX CONSTRUCTORS, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	Case No. 06-CV- 546-GKF-FHM
SHELTERING PALMS-TULSA I, LLC, <i>et al.</i> ,	)	
	)	
Defendants.	)	

**OPINION AND ORDER**

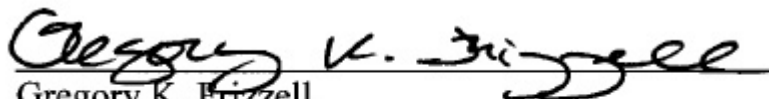
This matter comes before the court on the Government’s Motion to Reconsider or Amend the Court’s October 29, 2008 Opinion and Order [Doc. No. 98]. In its Opinion and Order dated October 29, 2008 [Doc. No. 97], the court denied the Department of Housing and Urban Development’s (“HUD”) motion to dismiss plaintiff’s amended complaint. The government asks the court to reconsider and/or amend its order because the order did not address HUD’s argument that acts giving rise to the claim must be authorized under the National Housing and because, the government asserts, the order does not properly address its arguments that the funds at issue are Treasury funds.

This court has reviewed the October 29, 2008, order, as well as its order of April 25, 2008 [Doc. No. 58]. In the earlier order, the court discussed at some length the issue of whether plaintiff’s equitable claims for relief fell within the limited waiver of sovereign immunity provided by 12 U.S.C. §1702 and concluded they did. *Id.* pp. 4-5. Concerning the issue of whether the funds sought are Treasury funds, the government now submits the declaration of HUD’s Director, Multifamily Financial Operations Division, Richard E. Braun. [Doc. 98, Ex.

A]. Braun states in his declaration that HUD had an account for the Asbury Square Apartments project, FHA project #118-35200, that the account was closed on January 9, 2007, and that HUD presently has no funds associated with, committed to or allocated to the account. This action was filed October 4, 2006. [Doc. No. 2]. Issues pertaining to subject matter jurisdiction must be determined as of the time at which the action was filed. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 180 (2000); *Nova Health Systems v. Gandy*, 416 F.3d 1149, 1155 (10th Cir. 2005); *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1061 (5th Cir. 1991). Therefore, the court concludes the funds at issue were, in fact, funds held by HUD at the time of the filing of the suit and subject matter jurisdiction exists.

Defendant's Motion to Reconsider [Doc. No. 98] is denied.

DATED this 11<sup>th</sup> day of December, 2008.

  
Gregory K. Frizzell  
United States District Judge  
Northern District of Oklahoma